

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARLIN L. GEORGE, JR.,)
Plaintiff,) CASE NO. C13-5767-RAJ-MAT
v.)
CAROLYN W. COLVIN, Acting) REPORT AND RECOMMENDATION
Commissioner of Social Security,) RE: SOCIAL SECURITY DISABILITY
Defendant.) APPEAL
)
)

Plaintiff Marlin L. George, Jr. proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends this matter be REMANDED for further proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1981.¹ He has a GED (AR 120), and past work as a

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of
Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 fishing vessel deckhand and construction worker II. (AR 34.)

02 Plaintiff filed an application for SSI on August 9, 2010, alleging disability beginning
03 August 12, 2010. Plaintiff's application was denied at the initial level and on reconsideration,
04 and he timely requested a hearing.

05 On April 24, 2012, ALJ Glen G. Meyers held a hearing, taking testimony from plaintiff,
06 his wife, and a vocational expert. (AR 41-90.) On May 10, 2012, the ALJ issued a decision
07 finding plaintiff not disabled. (AR 23-36.)

08 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review
09 on May 21, 2013 (AR 1-5), making the ALJ's decision the final decision of the Commissioner.
10 Plaintiff appealed this final decision of the Commissioner to this Court.

11 **JURISDICTION**

12 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

13 **DISCUSSION**

14 The Commissioner follows a five-step sequential evaluation process for determining
15 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
16 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
17 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be
18 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
19 left femur fracture status post intramedullar rodding, adjustment disorder with anxious mood,
20 and polysubstance abuse and alcohol abuse in remission severe. Step three asks whether a
21 claimant's impairments meet or equal a listed impairment. The ALJ found plaintiff's

22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 impairments did not meet or equal the criteria of a listed impairment.

02 If a claimant's impairments do not meet or equal a listing, the Commissioner must
03 assess residual functional capacity (RFC) and determine at step four whether the claimant has
04 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to
05 perform light work as defined in 20 C.F.R. § 416.967(b), except that he cannot stoop, crawl,
06 balance, crouch, or kneel. Plaintiff can perform simple repetitive tasks, cannot have contact
07 with the public, can have frequent contact with supervisors and co-workers, and would have
08 less than one unscheduled absence per month. With that assessment, the ALJ found plaintiff
09 unable to perform his past relevant work.

10 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
11 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
12 an adjustment to work that exists in significant levels in the national economy. With the
13 assistance of a vocational expert, the ALJ found plaintiff capable of performing other jobs, such
14 as small products assembler II and poultry dresser.

15 This Court's review of the ALJ's decision is limited to whether the decision is in
16 accordance with the law and the findings supported by substantial evidence in the record as a
17 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
18 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
19 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
20 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
21 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
22 F.3d 947, 954 (9th Cir. 2002).

01 Plaintiff argues the ALJ failed to fully explain the weight given to the opinion of Dr.
 02 Raymond West and failed to give legally sufficient reasons for rejecting the opinion of treating
 03 psychiatrist Ann Bruce, M.D. He requests remand for further administrative proceedings.
 04 The Commissioner argues the ALJ's decision is supported by substantial evidence and should
 05 be affirmed.

06 Medical Opinion Evidence

07 The ALJ may reject physicians' opinions "by setting out a detailed and thorough
 08 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
 09 making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,
 10 881 F.2d at 751. Rather than merely stating his conclusions, the ALJ "must set forth his own
 11 interpretations and explain why they, rather than the doctors', are correct." *Id.* (citing *Embrey*
 12 *v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

13 In general, more weight should be given to the opinion of a treating physician than to a
 14 non-treating physician, and more weight to the opinion of an examining physician than to a
 15 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not
 16 contradicted by another physician, a treating or examining physician's opinion may be rejected
 17 only for "clear and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391,
 18 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may
 19 not be rejected without "specific and legitimate reasons" supported by substantial evidence in
 20 the record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.
 21 1983)).

22 / / /

01 A. Raymond West, M.D.

02 Dr. West evaluated plaintiff on October 26, 2010, conducting a records review, physical
03 examination, and functional assessment. (AR 294-99.) The ALJ indicated he was giving
04 “considerable weight to Dr. West’s limitations for standing/walking, and sitting.” (AR 33.)
05 However, as plaintiff correctly points out, the ALJ’s RFC finding did not include those
06 limitations. The ALJ found plaintiff able to perform “light work as defined in 20 C.F.R.
07 416.967(b),” without incorporating any standing, walking or sitting limitations. (AR 27.)
08 The ALJ did not reject those limitations – he simply failed to address them.

09 The Court notes with consternation that the Commissioner makes no meaningful
10 response to plaintiff’s fairly straightforward argument. Instead, the Commissioner does no
11 more than reiterate, at length and in considerable detail, the ALJ’s decision. (Dkt. 14 at 6-10.)
12 The Commissioner does not address the issue actually before this Court – whether the ALJ
13 failed to address significant probative evidence. *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th
14 Cir. 1995) (ALJ “may not reject ‘significant probative evidence’ without explanation.”)
15 (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984)). In this case, the ALJ erred
16 in failing to fully address Dr. West’s opinion.

17 B. Ann Bruce, M.D.

18 Plaintiff’s second assignment of error relates to the ALJ’s consideration of the opinion
19 of treating psychiatrist Ann Bruce, M.D. Dr. Bruce provided mental health treatment to
20 plaintiff over an extended period. (AR 356-62, 365, 367-70, 372-73, 375, 378-79, 382, 385,
21 388, 391-92, 394, 396, 398, 401, 403, 408, 410, 412.) She also referred plaintiff for neuro-
22 psychological evaluation. (AR 312-18.) The ALJ gave “little to no weight” to Dr. Bruce’s

01 assessment that plaintiff was unable to sustain employment, finding that opinion to be
02 inconsistent with the treatment notes showing “generally mild clinical findings,” grossly intact
03 cognition, drug relapses, noncompliance with medication, and plaintiff’s activities. (AR 33.)

04 Plaintiff disputes the ALJ’s characterization of the clinical findings and cognitive
05 problems described in the treatment notes, arguing the ALJ focuses almost exclusively on
06 selected notes that supported the ALJ’s conclusion, ignoring those notes and observations that
07 did not. Plaintiff provides numerous examples in his opening and reply briefs to support this
08 contention. (Dkt. 13 at 7-8; Dkt. 17 at 5-10.) Unfortunately, the Commissioner again fails to
09 respond directly to plaintiff’s arguments, other than again reciting the ALJ’s findings and then
10 concluding with the assertion the ALJ comprehensively analyzed the record and his
11 assessments should be affirmed. (Dkt. 14 at 18-20.)

12 The Court agrees with plaintiff the decision fails to fully and fairly address the mental
13 health evidence that contradicts the ALJ’s findings. “Although it is within the power of the
14 Secretary to make findings concerning the credibility of a witness and to weigh conflicting
15 evidence, *Rhodes v. Schweiker*, 660 F.2d 722, 724 (9th Cir.1981), he cannot reach a conclusion
16 first, and then attempt to justify it by ignoring competent evidence in the record that suggests an
17 opposite result. *Whitney v. Schweiker*, 695 F.2d 784, 788 (7th Cir.1982).” *Gallant v. Heckler*,
18 753 F.2d 1450, 1455-56 (9th Cir. 1984).

19 On remand, the ALJ should reevaluate the mental health evidence as a whole. If the
20 ALJ finds Dr. Bruce’s opinions ambiguous or inadequate, he should recontact the doctor for
21 clarification or obtain a consultative examination. 20 C.F.R. § 416.912(e) (ALJ has an
22 obligation to recontact a treating physician or psychologist when the evidence received is

01 inadequate for a determination of disability). *See also Widmark v. Barnhart*, 454 F.3d 1063,
02 1068 (9th Cir. 2006) (“[T]he ALJ should not be ‘a mere umpire’ during disability proceedings.
03 Rather, the ALJ has ‘a special duty to fully and fairly develop the record and to assure that the
04 claimant’s interests are considered.’”) (quoted sources omitted).

05 **CONCLUSION**

06 For the reasons set forth above, this matter should be REMANDED for further
07 proceedings.

08 DATED this 15th day April, 2014.

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11 Mary Alice Theiler
12 Chief United States Magistrate Judge
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